In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1443

HOMEZELL CHAMBERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a–5a) is reported at 306 F. Supp. 317. The *per curiam* opinion of the court of appeals (Pet. App. 6a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1971. The petition for a writ of certiorari was filed on March 5, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 5 U.S.C. 2353(c) required the Secretary of Defense to fix salaries for teachers of minor dependents of military personnel abroad at rates equal

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to the rates of basic compensation for similar positions in the United States.

STATUTE INVOLVED

The relevant provisions of the Defense Department Overseas Teachers Pay and Personnel Practices Act of 1959, 73 Stat. 213, 5 U.S.C. 2351 *et seq.*, are set forth at Pet. App. 7a–17a.

STATEMENT

Petitioners are teachers presently or formerly employed in the school system maintained by the Defense Department for the education of the minor dependents of military personnel abroad. In this suit for back pay for the years 1960 through 1966, petitioners [1] contend that the Defense Department Overseas Teachers Pay and Personnel Practices Act of 1959, 73 Stat. 213, 5 U.S.C. 2351 *et seq.*,[2] required the Secretary of Defense to adjust the compensation of overseas teachers to the level of salaries paid for similar work in this country.

The Act authorized the Secretary of each military department, subject to regulations promulgated by the Secretary of Defense, to fix compensation for overseas teaching positions "in relation to the rates

[1] This suit was instituted on behalf of the individual named plaintiffs and all other overseas teachers similarly situated except those whose rights were adjudicated in a virtually identical suit brought in the United States Court of Claims, *Crawford* v. *United States*, 376 F. 2d 266, certiorari denied, 389 U.S. 1041 (Pet. App. 29a–55a).

[2] This Act was, as discussed *infra*, substantially amended in 1966, and in its present form is codified as 20 U.S.C. (Supp. V) 901 *et seq.*

of basic compensation for similar positions in the United States," 5 U.S.C. 2353(c). The Secretary of Defense interpreted this language as requiring any salary scale to meet the limitations provided by the ceiling on funds that might be expended on education of dependents. This so-called "per pupil limitation," which was routinely inserted in defense appropriation bills both before and after the 1959 Act, fixed the maximum average amount that could be expended for educational services in connection with each dependent.

In 1960, the first year of operation under the Act, the teachers' salaries fixed by the Secretary were generally commensurate with those paid in the United States. Thereafter, while teaching salaries in this country increased, the Department of Defense each year requested increases in the "per pupil limitation" to allow for raises for overseas teachers. Congress, however, declined to appropriate funds sufficient to permit the overseas teachers' salaries to keep pace.

In 1966, the Act was amended. Congress deleted the language authorizing the Secretary to prescribe regulations fixing the compensation for overseas teachers "in relation to" salaries in this country and substituted a direction that the Secretary prescribe regulations providing for:

> (2) the fixing of basic compensation for teachers and teaching positions at rates *equal to* the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of

> 100,000 or more population [80 Stat. 117, 20 U.S.C. (Supp. V) 902(a)(2) (emphasis supplied)].

This amendment, however, was expressly given only prospective application (80 Stat. 118).

Relying on the 1959 Act, petitioners seek recovery of the difference between the salaries paid them and what they would have received if their salaries had been "equal to" the earnings of teachers in comparable systems in the United States. On cross motions for summary judgment, the district court ruled in favor of the government (Pet. App. 1a–5a). The court pointed out that the contemporaneous construction of the Act by the Secretary, by Congress, and by petitioners' own representatives (educational associations) reflected awareness that under the Act the Secretary had discretion in setting rates for teachers' salaries and that those rates were subject to limitations in the relevant congressional appropriations (Pet. App. 4a). The court also noted that, upon substantially the same record, the Court of Claims (two judges dissenting) had reached the same conclusions. *Crawford* v. *United States,* 376 F. 2d 266, certiorari denied, 389 U.S. 1041 (Pet. App. 29a–55a).[3] The court

[3] Prior to both the present suit and *Crawford*, the Overseas Education Association brought a class action for mandamus against the Secretary of Defense, presenting the same contentions made here and in *Crawford*, that is, that the Act required the Secretary to raise and to maintain overseas teachers' salaries at levels equal to those prevailing in the United States. The Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the action on the ground, among

of appeals affirmed on the opinion of the district court (Pet. App. 6a).

ARGUMENT

The decision of the courts below is correct, in accord with the only other decisions interpreting the provision in question, and of no prospective importance. Moreover, the issues presented are the same as those in *Crawford* v. *United States, supra,* where certiorari was denied, 389 U.S. 1041. Review by this Court is therefore not warranted.

1. In support of their contention that they were underpaid, petitioners point to 5 U.S.C. 2353(c), which provided in pertinent part that:

> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department *in relation to* the rates of basic compensation for similar positions in the United States * * *. [Emphasis supplied.]

But the statute was cast in discretionary, not mandatory terms. The Act said pay scales shall be fixed "in relation to" domestic levels, and in ordinary usage this standard includes more flexibility than the "equal to" requirement petitioners would read into the statute. Nowhere was there any reference to mandatory periodic review and adjustment of salaries once fixed initially.

The history of the legislation explains why. As the district court recognized (Pet. App. 1a–2a), this legis-

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others, that fixing appropriate levels of teachers' pay was a matter the Act committed to executive discretion. *Mitchell* v. *McNamara*, 352 F. 2d 700.

lation was enacted because the conditions peculiar to school teaching (long summer vacations and holiday recess periods) could not easily be accommodated within the framework of the pay and leave statutes covering regular government employment. It was to eliminate the hardships caused by applying those statutes to teaching positions that Congress legislated in 1959.[4] The statutes generally regulating the pay of federal civil servants at that time contained no provisions for mandatory increases in federal salaries to reflect a rise in comparable non-federal salaries. Consistent with these statutes, nowhere in the committee reports or in the floor debates on the legislation here involved was there any suggestion that the legislation—enacted as a substitute for the regular legislation governing the conditions of federal employment—would entail such an automatic pay raise feature and confer preferred status on overseas teachers. On the contrary, the statute was enacted after Congress heard representatives of the overseas teachers themselves state that this legislation was not intended as a pay-raise measure (Hearings on H.R. 1871 and related bills before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess., pp. 41–42 (1959)).

The district court accurately observed (Pet. App. 3a–4a) that the Secretary's interpretation of the Act, made at the time of its passage and continu-

[4] See H. Rep. No. 357, 86th Cong., 1st Sess.; S. Rep. No. 141, 86th Cong., 1st Sess.

ously asserted before Congress and with the teachers, was that his authority to raise the pay of overseas teachers was contingent upon adequate congressional appropriations, that is, increases in the "per pupil limitations" on overseas school expenditures in the annual Defense Department appropriation bills. As the court noted (Pet. App. 3a), there is no permanent legislation respecting the overseas school program for military dependents. Authority to operate such schools is contained only in the annual Defense Department appropriation acts. These appropriations consistently limited the funds expendable for such purposes to an average specified amount "per student," and such expenditures historically determined the amounts available for the salaries of overseas teachers.

In this context, the Secretary's interpretation of the Act as authorizing him to raise teachers' salaries only if Congress raised the "per pupil" allotment sufficiently to permit him to do so was entirely reasonable. In some years Congress granted the Secretary's request that the "per pupil limitation" be raised so that teachers' salaries could be increased, and in other years Congress refused (Pet. App. 18a, 31a, 46a, n. 8). Not only was the administrative interpretation repeatedly brought to the attention of Congress,[5] but petitioners' own representatives also advised Congress of their similar understanding and in each appropriation bill Congress acted on the basis

[5] See *Crawford* v. *United States*, *supra*, 376 F. 2d at 275, n. 8, and Pet. App. 46a, n. 8.

of that understanding.[6] *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408–410; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318–319.

2. The ruling below does not conflict with any other decision. On the contrary, it is in complete accord with rulings of the Court of Claims in *Crawford* v. *United States*, 376 F. 2d 266, certiorari denied, 389 U.S. 1041, and the Court of Appeals for the District of Columbia Circuit in *Mitchell* v. *McNamara*, 352 F. 2d 700.

United States v. *Langston*, 118 U.S. 389, and *United States* v. *Vulte*, 233 U.S. 509, on which petitioners rely, hold only that statutes fixing the salaries of public officers at a "designated sum" are not considered to be abrogated by subsequent acts that appropriate lesser amounts for that officer for given years, unless there is specific language to that effect.[7] Here the Act did not establish specific levels for the

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[6] See, *e.g.*, Hearings on H.R. 7851, before the Subcommittee of the Senate Committee on Appropriations, 87th Cong., 1st Sess., p. 1054 (1962), and Hearings on H.R. 7179 before the Subcommittee of the Senate Committee on Appropriations, 88th Cong., 1st Sess., p. 1456 (1964), both quoted in the *Crawford* opinion, 376 F. 2d at 274 (Pet. App. 44a–45a).

Congressional acquiescence in the Secretary's interpretation of the Act is apparent from the Senate's refusal to permit the Defense Department to pay for certain items traditionally included in the per pupil allotment out of other funds in order to increase the money available for teachers' salaries. See S. Rep. No. 1238, 88th Cong., 2d Sess., pp. 17–18 (1964).

[7] Of course, as the Court has recognized, Congress may repeal substantive legislation in later appropriations measures. *E.g.*, *United States* v. *Dickerson*, 310 U.S. 554; *Belknap* v. *United States*, 150 U.S. 588; *United States* v. *Mitchell*, 109 U.S. 146.

salaries of overseas teachers, and under the Secretary's regulations (Pet. App. 21a–23a) the salaries would not be set administratively until Congress determined the "per pupil limitation." By its consistent refusal to approve Defense Department budgets sufficient to provide for the pay increases petitioners believed to be mandatory, Congress was not repealing earlier substantive legislation. It was simply legislating in accordance with its own and with the Secretary's understanding that the Act made such raises contingent on Congressional approval of expenditures for that purpose. Cf. *Panama Canal Co.* v. *Grace Line, supra.*

3. The question of statutory construction posed by petitioners is not prospectively important. As noted above, in 1966 the Overseas Teachers' Pay Act was amended to direct the service Secretaries in the future to fix basic compensation for overseas teachers "at rates *equal to*" average rates for similar employment in specified urban school districts in this country. 20 U.S.C. (Supp. V) 903(c) (emphasis supplied). Moreover, the issues raised here do not differ from those in *Crawford* v. *United States, supra,* where certiorari was denied, 389 U.S. 1041.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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